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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

ORVILLE R. MERTZ and
McGRAW-HILL, INC.,

Petitioners,

v.

WILLIAM A. DENNY,

Respondent.

On Writ of Certiorari
to the Supreme Court of the
State of Wisconsin

PETITION FOR WRIT OF CERTIORARI

DON S. PETERSON
MARK S. SCHMITT
of
MINAHAN & PETERSON, S.C.
815 East Mason Street
Milwaukee, Wisconsin 53202
(414) 276-1400

Attorneys for McGraw-Hill, Inc.

LAURENCE C. HAMMOND, JR.
(Counsel of Record)
JAMES A. BAXTER, III
RALPH V. TOPINKA
of
QUARLES & BRADY
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000

Attorneys for Orville R. Mertz

QUESTIONS PRESENTED

1. Did the Wisconsin Supreme Court err in determining whether the plaintiff in a defamation action was a "public figure" by attempting to measure the legitimacy and extent of the public's interest in a controversy involving a publicly-traded corporation, rather than focusing on the extent of the plaintiff's voluntary involvement in the controversy?

2. Did the Wisconsin Supreme Court err in holding that the first amendment and the equal protection clause of the fourteenth amendment to the United States Constitution afford no protection for speech by a non-media defendant in a defamation case?

3. Did the Wisconsin Supreme Court's holding requiring defamation defendants, including media defendants, to bear the burden of proving truth as a defense result in an unconstitutional imposition of liability without fault?

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PETITION FOR WRIT OF CERTIORARI

Petitioners Orville R. Mertz and McGraw-Hill, Inc.* pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of Wisconsin entered in this action on March 30, 1982.

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*Pursuant to Supreme Court Rule 28.1, petitioner McGraw-Hill, Inc., provides the following list of subsidiaries (except wholly-owned subsidiaries) and affiliates: Newton Falls Paper Mill, Inc., Rock-McGraw, Inc., American Industrial Report Ltd., McGraw-Hill Ryerson Limited, Nikkei-McGraw-Hill, Inc., and Tata McGraw-Hill Publishing Company Private Limited.

OPINIONS BELOW

The decision and order of the Supreme Court of the State of Wisconsin, dated March 30, 1982, is reported at 106 Wis.2d 636, 318 N.W.2d 141 (1982), and at 8 Med. L. Rep. (BNA) 1369, and is reproduced in the appendix to this petition, *infra*, at A-1 *et seq.*

The opinion of the Court of Appeals of the State of Wisconsin is reported at 100 Wis.2d 332, 302 N.W.2d 503 (1981), and also at 7 Med. L. Rep. (BNA) 1261, and is reproduced in the appendix to this petition, *infra*, at B-1 *et seq.*

The decision and judgment of the trial court is reported at 5 Med. L. Rep. (BNA) 2509 (1980), and is reproduced in the appendix to this petition, *infra*, at C-1 *et seq.*

A previous decision of the Supreme Court of the State of Wisconsin in this case is reported at 84 Wis.2d 654, 267 N.W.2d 304 (1978), and also at 4 Med. L. Rep. (BNA) 1153, and is reproduced in the appendix to this petition, *infra*, at D-1 *et seq.*

A previous decision of the trial court in this case is reproduced in the appendix to this petition, *infra*, at E-1 *et seq.*

JURISDICTION

The opinion and order of the Supreme Court for the State of Wisconsin was entered on March 30, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). Although there are further proceedings yet to come in the state court, the federal issues in this case have been finally decided. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975). If the Wisconsin Supreme Court's rulings on the federal issues involving public figure status and constitutional protection for speech are reversed, the case will be ended.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The first amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The fourteenth amendment to the United States Constitution, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State may enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF THE CASE

Respondent William A. Denny (hereafter "Denny") commenced this action against petitioners Orville R. Mertz (hereafter "Mertz") and McGraw-Hill, Inc. (hereafter "McGraw-Hill") in April, 1976. Denny alleged damages based upon defamation, stemming from an article which appeared in the January 19, 1976 issue of McGraw-Hill's magazine *Business Week*. The article, entitled "Top Management Ferment at Koehring" (App. at F-1), concerned shareholder unrest and the turnover of top management personnel at the Koehring Company (hereafter "Koehring"), most notably petitioner Mertz, who resigned as Chairman of the Board and Chief Executive Officer on December 5, 1975. The Koehring Company was a

publicly held corporation listed among *Fortune* magazine's top 500 corporations. The company is based in Milwaukee, Wisconsin. Denny had been employed at Koehring as senior staff attorney until 1969 when he resigned. (App. at C-1.)

During 1974 and 1975, Denny was extremely active and vocal in his opposition to the management of Koehring and led a movement to oust Mertz and change the company's directors. (Jt. App. at 159, 165, 171-73.)* At his deposition, Denny testified that, in his opinion, he did influence the results of that movement. (Jt. App. at 170-71.) Toward that end, in early 1975, Denny commenced a letter-writing campaign to Charles W. Walton, a Vice President, General Counsel and Secretary of the corporation demanding access to Koehring's corporate records in order to prepare for the annual shareholder meeting. (Jt. App. at 101.) When Denny was denied access, he commenced a civil action against Koehring and Walton in the Milwaukee County Circuit Court. Denny was successful in that action and was allowed access to the documents.

Denny precipitated inquiries to Koehring Company by the United States Securities and Exchange Commission. Denny informed the SEC that he had reviewed various materials mailed to Koehring shareholders and he felt there were misstatements and material omissions. (Jt. App. at 102-04.) In addition, Denny contacted the office of the Wisconsin Commissioner of Securities concerning the company. Denny's inquiries prompted an investigation by the State of Wisconsin.

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*Pursuant to Supreme Court Rule 19.1, petitioners have concluded that the record of this case is not essential to a proper understanding of the case and therefore have not requested that the record be certified and transmitted to this Court. Petitioners believe, however, that some citation should be provided as a basis for its statement of facts. Accordingly, petitioners have cited the joint appendix they filed with their brief in the Wisconsin Court of Appeals. Pursuant to the request of the Wisconsin Supreme Court, this brief and joint appendix were filed in the Wisconsin Supreme Court as well. The citation to "Jt. App." refers to this joint appendix. Where appropriate, of course, citations will be made to the appendix filed with this petition. These citations will be to "App."

At the March, 1975 shareholder meeting, Denny was active in his opposition to the management and existing Board of Directors. He raised many questions from the floor of the meeting, challenged the propriety of certain procedures, and generally voiced his opposition to the management of the company. In the wake of that meeting, the *Milwaukee Sentinel*, a daily newspaper, published an article concerning the shareholder meeting and specifically reported about Denny:

> Principal spokesman for the critics was Attorney William A. Denny, who headed Koehring's legal department for 14 years prior to 1969 and who was the author of the suit to open the management filed [sic] last month.
>
> Denny reportedly holds 4,400 shares of Koehring stock.

(App. at F-4, 6.) The article concluded by noting that Denny was interviewed after the meeting and stated that his group sought to review certain actions by Koehring management. As the article noted: "It is some of those moves that the dissident group seeks to review, Denny indicated later." (App. at F-7.)

In July of 1975 Denny brought a second suit against Koehring and Walton in the Milwaukee County Circuit Court. Denny again sought and received access to certain Koehring records. In addition, by letter dated November 17, 1975, Denny wrote to hundreds of large shareholders of Koehring Company. (Jt. App. 106, 161-62.) He sought to rally their support in opposition to the management of the company. On November 26, 1975, Denny again wrote the Koehring Directors, enclosing copies of some of the letters he had received in response to his letter to shareholders of November 17, 1975. He concluded the letter by asking if there was any other way he could convince a majority of the Board of Directors that it was time to change top management at the company. (Jt. App. at 107.)

In response to the controversy and opposition created by Denny, defendant Mertz resigned as Chairman of the Board and Chief Executive Officer on December 5, 1975.

Throughout the course of his activities in 1975, both Denny and the Koehring controversy were given wide coverage by the press. On February 27, 1975, *The Milwaukee Journal* reported that Denny had sued Koehring in order to inspect corporate minutes and shareholder records. (App. at F-7.) A follow-up article appeared in the *Milwaukee Sentinel* the next day, headlined "Koehring Holder Wins Plea". (App. at F-8.) On March 22, 1975, both *The Milwaukee Journal* and *Milwaukee Sentinel* reported on the Koehring shareholder meeting the day before. (App. at F-4 and 9.) Both articles made reference to Denny's activities at the meeting, *The Milwaukee Journal* article noting:

> One of the most vocal and persistent in procedural moves was William A. Denny, Elm Grove, a lawyer who headed Koehring's legal department before leaving in 1969.

(App. at F-12.) At his deposition, Denny admitted receiving calls from reporters, and also testified that he himself had made one call to a reporter of a Milwaukee paper. (Jt. App. at 163.) Denny retained a list of newspapers and their telephone numbers. (Jt. App. at 125.)

On March 28, 1975, Denny wrote a two-page letter to *The Wall Street Journal* in an attempt to increase coverage of the Koehring controversy. Denny wrote, in part:

> Here's a copy of recent articles in the Milwaukee newspapers about the March 21st Koehring Company Annual Shareholders Meeting.
>
> I was a bit surprised to see no reference of that meeting in your paper this past week.

* * *

> I fully appreciate that you must apply your own judgment as to what is newsworthy and what is not. However if you think there is anything involved here which may be of interest to your readers, I would be glad to help you get such facts as might be accessible to myself or a client of ours. I had a court reporter in attendance at the Annual Meeting. However no transcript has been prepared because a $300 estimate is a bit too large for my client's pocketbook.

(App. at G-1.) According to a file memorandum prepared by Denny on April 2, 1975, Ames Smithers, a reporter for *The Wall Street Journal*, called Denny on April 1. After noting the reporter's telephone number and address, Denny wrote:

> He expressed a keen interest in anything else that might develop with respect to Koehring Company that might be newsworthy. He asked for my promise to inform him as to anything that might be filed in Court regarding Mertz and Loewi and the Career Academy and National Tape shares.
>
> I told him I would do all that I could.

(App. at G-3.) On April 9, 1975, *The Wall Street Journal* noted that the Koehring Company had repurchased 100,000 of its shares from the retirement trust. (App. at F-14.) This was also reported in *The Milwaukee Journal* on April 8, 1975. (App. at F-13.) Denny had previously alerted *The Wall Street Journal* that this was likely to occur.

On April 28, 1975, *The Wall Street Journal* reported that Karl H. Schwamborn had been elected a director of Koehring Company. (App. at F-15 and 16.) The article began:

> Responding to pressure from dissident shareholders, directors of Koehring Corp. expanded the Board to 11 from 10 and filled the vacancy with a Koehring executive whom dissidents had tried to elect as director at the annual meeting in March.

The Milwaukee Journal and *Milwaukee Sentinel* also ran stories on Schwamborn's election (App. at F-14 and 15).

In July of 1975, *The Wall Street Journal* reported Robert Lindgren's selection as President of Koehring (App. at F-19), as did *The Milwaukee Journal* and *Milwaukee Sentinel.* (App. at F-16 and 18.) The *Milwaukee Sentinel* article mentioned the attack on Koehring management by dissident shareholders at the previous annual meeting.

Business Week became interested in the Koehring controversy on December 5, 1975, the day Mertz resigned. The resignation was reported in *The Milwaukee Journal,* the *Milwaukee Sentinel, The Wall Street Journal* (App. at F-19-23) and on the Dow Jones wire. *Business Week* Reporter David Santry testified at his deposition that he was intrigued by Mertz's statement that he was resigning in the wake of shareholder controversy. Santry thought this was of interest to the general business community. (Jt. App. at 145-46.) Santry contacted a source in Milwaukee, who told him that he should contact Denny, one of the leaders of the opposition, for more information. (Jt. App. at 147.)

Santry contacted Denny in Milwaukee. As a result of Santry's inquiry, Denny sent him approximately 188 pages of material from Denny's files. (Jt. App. at 118-22.) Included were copies of eight different newspaper articles on Koehring and Mertz, copies of pleadings relating to the two suits brought by Denny against the company, copies of items of correspondence between Denny and Walton, a copy of Denny's letter to Koehring shareholders, copies of shareholders' replies to Denny, copies of press releases, copies of Koehring's quarterly report and annual report, and a number of other materials. When Santry received the materials he became interested in the story and contacted Denny again. Denny gave Santry the names and telephone numbers of a number of other people involved in the controversy who could be contacted.

Santry called and interviewed the men identified by Denny. (Jt. App. at 149.) In at least one instance, Denny assisted Santry

in his attempt to interview one of the men, who resided in Germany. In Santry's opinion, Denny was a "great source" and had "lots of specific information." (Jt. App. at 150.) In addition, Santry noted: "He was a treasure-trove, you might say, more than willing to help." (Jt. App. at 149.)

In the course of preparing the article, Santry attempted repeatedly to contact Mertz regarding his view of the controversy. On December 30, 1975, Santry finally contacted Mertz by telephone at his home. Santry asked Mertz about events at Koehring. Concerned that Denny might not have objectively represented the facts regarding both Mertz's activities and the health of the company, Mertz telephoned Santry later that same day. (Jt. App. at 136, 142-43.) Mertz hoped to alert Santry to Denny's critical attitude toward Mertz and "to filter [Denny's] comments." (Jt. App. at 136.) In the course of the conversation, Mertz told Santry that Denny's employment with Koehring had been "terminated." (Jt. App. at 139, 154.)

Thereafter, *Business Week* published the January 19, 1976 article concerning the Koehring management controversy. The statement upon which this action is based is a single phrase appearing near the end of the article concerning Mertz and Koehring's management, mentioning that Denny had been "general counsel of Koehring until Mertz fired him in 1969 . . ." (App. at F-3.) Based on an appeal following the trial court's overruling petitioners' motions to dismiss, the Wisconsin Supreme Court in *Denny v. Mertz*, 84 Wis. 2d 654, 267 N.W.2d 304 (1978), ruled that the term "fired" might be deemed defamatory under the circumstances. The case was sent back to the trial court where discovery then proceeded.

After discovery, petitioners brought motions for summary judgment. Petitioners asserted that respondent was a public figure and that under the test of *New York Times v. Sullivan*, 376 U.S. 254 (1964), there was no evidence of actual malice and that therefore respondent could not prevail. (App. at C-7-9.) The trial court granted the motions for summary judgment. The court of appeals reversed. (App. at B-1.) Petitioners again raised the public figure issue in the State Supreme Court and

argued that a non-media defendant such as Mertz was entitled to constitutional protections for the statements made to the *Business Week* reporter. (App. at A-1, 5, 21.) The State Supreme Court *sua sponte* raised and decided the issue of who bears the burden of proof on the issue of falsity in a defamation case. (App. at A-23, n.35.)

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW ERRED BY ATTEMPTING TO MEASURE THE LEGITIMACY AND EXTENT OF THE PUBLIC'S INTEREST IN A CONTROVERSY AND BY MISAPPLYING THIS COURT'S CRITERIA TO BE USED TO DETERMINE WHETHER A DEFAMATION PLAINTIFF IS A PUBLIC FIGURE.

Petitioners argued in the court below that respondent Denny was a "limited purpose public figure" for purposes of the defamation action at issue in this case. This Court has adopted a two-part test for determining whether a defamation plaintiff is a limited purpose public figure. A court must first determine whether a public controversy existed and then must determine whether the defamation plaintiff voluntarily involved himself in efforts to influence the outcome of the controversy. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 and 351-52 (1974). Under this test, courts are to examine the nature and extent of an individual's participation in the controversy:

> More commonly, those classified as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> • • •
>
> It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and

> extent of an individual's participation in a particular controversy giving rise to the defamation action.

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 345 and 352.

In reaching its decision, the trial court below found that Denny voluntarily became involved in the controversy surrounding Koehring, that he injected himself into the controversy, that he attempted to influence the resolution of the controversy, and that he drew attention to the controversy through contacts with the press. The Wisconsin Supreme Court did not reject these findings. Instead, the Wisconsin court held that Denny was not a public figure because: (a) there was no "public controversy" surrounding the Koehring stockholder disputes; (b) by the time Denny talked to the *Business Week* reporter, Mertz had resigned and therefore the controversy had ended; (c) Denny did not have sufficient access to the media; and (d) Denny was motivated by personal financial interest rather than some general concern for corporate governance.

A. Existence of Public Controversy.

The Wisconsin court conceded that "Denny did deliberately involve himself in the Koehring dispute in order to influence the management of Koehring," but still held that Denny was not a public figure because there was no public controversy. The court stated: "[w]hile newsworthy, the Koehring stockholder disputes did not have an impact outside of those immediately interested in the Koehring Corporation." (App. at A-12.)

The Wisconsin court properly examined the extent of Denny's activities, but then attempted to quantify the public's interest in the underlying controversy. This is constitutionally impermissible. The court attempted to determine whether the Koehring controversy was relevant to the general public. It attempted not only to quantify the public's interest in the controversy but also to measure the legitimacy of that interest. This type of analysis was expressly repudiated by the Court in *Gertz* and was the reason the plurality decision in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29 (1971), was rejected in *Gertz*:

> [The "public or general interest" test set forth in *Rosenbloom*] would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of "general or public interest" and which do not — to determine, in the words of Mr. Justice Marshall, "what information is relevant to self-government." *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 79. We doubt the wisdom of committing this task to the conscience of judges.

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 346.

Courts are not to determine what is "relevant to self-government." As pointed out by Justice Marshall in his dissent in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. at 79 (Marshall, J., *dissenting*), "all human events" are arguably of public interest.

The Court has consistently declared that the proper focus is on the individual's actions, not the substantive nature of the controversy. In *Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976), for instance, the Court said:

> It was our recognition and rejection of this weakness in the *Rosenbloom* test which led us in *Gertz* to eschew a subject-matter test for focusing upon the character of the defamation plaintiff.

More recently, in *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. 157, 167 (1979), the Court stated:

> We emphasized [in *Gertz*] that a court must focus on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation."

In *Hutchinson v. Proxmire,* 443 U.S. 111, 135 (1979), quoting *Time, Inc. v. Firestone, supra,* at 456, the Court stated:

> The "use of such subject-matter classifications to determine the extent of constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area."

The United States Courts of Appeals for the Fifth and Eighth Circuits recognized in recent cases that the determination of a person's status as a "public figure" must focus upon that person's actions rather than the underlying controversy. In *Brewer v. Memphis Pub. Co., Inc.*, 626 F.2d 1238 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981), the court said:

> To determine plaintiffs' status based on the latter formulation [prominence in the resolution of a public question], however, would require us to decide what is and is not a public question, a task the [U.S. Supreme] Court has stated is inappropriate for judges. . . . *We therefore focus instead on plaintiffs' actions in seeking publicity or voluntarily engaging in activities which necessarily involve the risk of increased exposure and injury to reputation.*

Id. at 1254 (emphasis added).

The legitimacy and extent of the public's interest should not be measured in deciding whether someone is a "public figure." The status of the person allegedly defamed is the "controlling factor." *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 584 (8th Cir.), *cert. denied*, 445 U.S. 945 (1980).

The danger of attempting to determine the legitimacy of the public's interest was recognized in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980), where the United States Court of Appeals for the District of Columbia warned:

> [A] court may not question the legitimacy of the public's concern; such an approach would turn courts

> into censors of "what information is relevant to self-government" [citations omitted]. A vital part of open public debate is deciding what should be debated. No arm of the government, including the judiciary, should be able to set society's agenda. Thus, courts must look to what already were disputes.

627 F.2d at 1296-1297 (footnotes omitted).

Courts should only determine whether something was a matter of controversy before the alleged defamation. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 591 (1st Cir. 1980). In this way, courts avoid determinations of what is in the public's interest. Such an inquiry, the court in *Bruno & Stillman, Inc.* pointed out, satisfies the stricture in *Hutchinson v. Proxmire, supra,* 443 U.S. at 135, that the media may not create their own defense by making the claimant a public figure.

The facts in this case demonstrate considerable public involvement with the Koehring controversy. The editors and publishers of *The Milwaukee Journal,* the *Milwaukee Sentinel, The Wall Street Journal* and *Business Week* all recognized it as a matter worthy of the public's attention, as did the Dow Jones wire service. At least sixteen different articles appeared in the local and national press from February through December, 1975, concerning Koehring and its management controversy.

The Wisconsin Supreme Court concluded that there was no public controversy because "the Koehring stockholder disputes did not have an impact outside those immediately interested in the Koehring corporation." (App. at A-12.) As noted by the dissent in the court below, the majority opinion did not explain the phrase "immediately interested in the Koehring corporation":

> If the phrase "immediately interested in the Koehring corporation" refers to the shareholders, the majority is talking about a dispute that has an impact on approximately 11,500 people. If the phrase "immediately

> interested in the Koehring corporation" refers to suppliers to and customers, competitors and employees of the corporation, and people living in communities in which plants are located (and I think all these persons can be considered as "immediately interested in the Koehring corporation"), the majority is talking about a dispute that has an impact on many thousands of people. Koehring, a *Fortune* 500, publicly owned, publicly traded international corporation with headquarters in Milwaukee, Wisconsin, employs between 10,000 and 11,000 persons at 23 plants in the United States, Canada, Germany, France, England and Japan and has sales offices in other countries. On how many thousands must the controversy have an impact in order for the majority to consider the matter a public controversy?

(App. at A-29, Abrahamson, J., *dissenting*.)

Corporate democracy and corporate governance have long been matters of wide concern, particularly within the business community. Such concern likely exceeds the public's interest in the matters which were considered public controversies in *Fram v. Yellow Cab Co.*, 380 F.Supp. 1314 (N.D.Pa. 1974) (local taxicab rates), *Cera v. Gannett*, 365 N.Y.S.2d 99 (1975) (merits of chiropractic medicine), *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979) (physical condition of a professional football player), and *James v. Gannett Co., Inc.*, 40 N.Y.2d 415, 353 N.E.2d 834 (1976) (belly dancing in Rochester, New York), all actions for defamation.

Likewise, cases decided under the *Rosenbloom* test of "public or general interest" recognized the variety of subject matters which were of general interest and therefore worthy of the public's attention. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970) (public accommodation at the Masters Golf tournament); *Steak Bit of Westbury, Inc. v. Newsday, Inc.*, 70 Misc. 2d 437, 334 N.Y.S.2d 325 (Sup. Ct. 1972) (food served at a local restaurant); and *Washington v. New York*

News, Inc., 37 App. Div.2d 557, 322 N.Y.S.2d 896 (1971) (bishop's attendance at a nightclub performance).

B. Termination of Controversy.

The Wisconsin Supreme Court also concluded that if there had been a controversy, it had ended by the time Denny talked with the *Business Week* reporter. The court relied on *Hutchinson v. Proxmire, supra*, for the proposition that a person may not be made into a public figure by the very publication which defames him.

Petitioners do not quarrel with this legal proposition. However, it is irrelevant to the facts here. At least sixteen different newspaper articles were published concerning the Koehring controversy beginning in February and carrying through December, 1975. A Dow Jones wire story ran on December 5, 1975. These all preceded the *Business Week* article. Petitioners have never contended that the *Business Week* article made Denny a public figure or initiated the public debate over Koehring's management problems.

The Wisconsin Supreme Court concluded that the controversy had ended when Denny rendered his considerable assistance to the *Business Week* reporter in preparing the article. This is incorrect. The record is clear that, while Mertz had resigned on December 5, 1975, Denny remained very active in the continuing controversy to change the board of directors at Koehring. As Denny himself said in a letter dated December 17, 1975, to Koehring stockholders:

> It now remains to be seen if the resigned chief executive officer and the directors who actively supported him will resign from the Board. If they don't, I am reasonably sure you will be hearing more on the subject of shareholders organizing for the next shareholders' meeting.

(Jt. App. at 127.) Denny obviously recognized the continuing effort to unseat directors — including Mertz — as an ongoing

controversy, and he was attempting to influence the outcome of that controversy by supplying a "treasure trove" of information to the *Business Week* reporter.

The effect of the Wisconsin Supreme Court's findings that the controversy had ended on or about December 5, 1975, and Denny was not a public figure is that Denny somehow reverted to private-figure status in a matter of days after involving himself in the controversy and with the media for almost a year. Neither the facts nor the law support this result. Furthermore, such a conclusion fails to afford "to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." *Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974).

C. Access to the Media.

Although seeming to recognize that access to the media, or lack thereof, is not dispositive of the public figure issue (App. at A-10, n. 17), the Wisconsin court concluded that:

> While Denny did deliberately involve himself in the Koehring dispute in order to influence the management of Koehring, his efforts to protect his investment in Koehring did not give him the media access which would justify designating him a public figure.

(App. at A-12.)

The court's factual determination that Denny did not have media access is dubious at best. Denny had significant contact with the media. He solicited media coverage of the controversy. He was interviewed and quoted by the media. His actions were reported in the media. Even if the court's factual determination regarding media access is correct, the court misreads the opinion in *Gertz*, where the Court stated:

> The first remedy of any victim of defamation is self-help — using available opportunites to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and

> public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

Gertz v. Robert Welch, Inc., supra, 418 U.S. at 344 (footnote omitted).

The Wisconsin Supreme Court placed undue emphasis on the notion of media access. The Court in *Gertz* did not hold that in order to "justify" designating a person as a public figure, he *must* have access to the media. Indeed, the very remedy the Court discussed in *Gertz* — self-help — was exercised by Denny. He contacted *Business Week* after the alleged defamatory statement appeared and requested a correction. *Business Week* published a correction in its March 1, 1976 issue. (App. at A-4.)

D. Motivation for Involvement.

Finally, the Wisconsin Supreme Court decided that Denny was not a public figure because his motivation for injecting himself into the Koehring controversy was personal financial interest, rather than an interest in corporate governance. Nothing in the decisions of this Court indicates that a person's motivation for voluntarily thrusting himself into a public controversy should be considered in determining whether that person is a public figure. Indeed, it follows that if it is wrong for courts to assess the nature of public controversies, it is wrong for courts to assess the motivation for a person's involvement in those controversies. The problems of attempting to assess motivation in this context are apparent. While it may appear that a person has thrust himself into a public controversy because of some economic interest, it is also likely that that person may be motivated at least in part by the prestige or notoriety attendant to involvement in the controversy. Even if such distinctions in motivation were relevant to a determination of public figure

status, courts are ill-equipped to assess accurately the motivation for involvement in any particular public controversy.

II. THE WISCONSIN COURT'S HOLDING THAT NON-MEDIA DEFENDANTS IN DEFAMATION CASES ARE ENTITLED TO NO CONSTITUTIONAL PROTECTION FOR SPEECH CONFLICTS WITH THE FIRST AND FOURTEENTH AMENDMENTS AND THE MAJORITY OF HOLDINGS IN OTHER STATE AND FEDERAL COURTS.

The court below held that a non-media defendant, like Mertz, in a defamation case is entitled to no constitutional protection for speech. (App. at A-23.) This holding raises questions under the first and fourteenth amendments, particularly in light of the facts of this case. Mertz supplied information to the press about a public figure and a matter of public interest already under investigation by the press. The investigation was due in substantial part to the efforts of Denny. To afford the press, which publicly reported on the matter, one level of protection and its sources of information a lesser level of protection, while attempting to preserve and protect robust debate of issues of public interest, would indeed be anomalous.

The press often initiates and carries on the type of debate typically afforded protection under the first amendment. More commonly, however, the press reports such debates as carried on by individual citizens. If citizens are reluctant to talk to the press about issues of public interest, then freedom of expression, and the role of the press in the exercise of that freedom, will be chilled. Indeed, freedom of the press guarantees the individual the right to put his ideas into wider circulation than he can through private conversation. Moreover, the first amendment specifically guarantees freedom of speech. The Wisconsin court's decision to afford individual defendants less protection than media defendants elevates freedom of the press over freedom of speech.

The highest courts of Alabama, Iowa, Kansas, Maine, Maryland, Oregon, Rhode Island, South Carolina and Virginia have recognized the application of the *Times-Sullivan* rule in actions against non-media defendants. *Bryan v. Brown,* 339 So. 2d 577 (Ala. 1976), *cert. denied,* 431 U.S. 954 (1977); *Anderson v. Low Rent Housing Com'n,* 304 N.W.2d 239 (Iowa), *cert. denied* 102 S. Ct. 645 (1981); *Scarpelli v. Jones,* 229 Ka. 210, 626 P.2d 785 (1981); *Michaud v. Inhabitants of Livermore Falls,* 381 A.2d 1110 (Me. 1978); *Jacron Sales v. Sindorf,* 276 Md. 580, 350 A.2d 688 (1976); *Wheeler v. Green,* 286 Or. 99, 593 P.2d 777 (1979); *De Carvalho v. daSilva,* 414 A.2d 806 (R.I. 1980); *Scott v. McCain,* 250 S.E.2d 118 (S.C. 1978); and *Fleming v. Moore,* 275 S.E.2d 632 (Va. 1981). *See also Sewell v. Brookbank,* 119 Ariz. 422, 581 P.2d 267 (Ct. App. 1978); *Williams v. Trust Co.,* 140 Ga. App. 49, 230 S.E.2d 45 (1976); *Martonik v. Durkan,* 23 Wash. App. 47, 596 P.2d 1054 (1979). Restatement (Second) of Torts §580A comment h (1977).

The federal circuit courts of appeals and district courts likewise have applied the *Times-Sullivan* standard in cases involving non-media defendants. *Lawrence v. Moss,* 639 F.2d 634 (10th Cir.), *cert. denied,* 451 U.S. 1031 (1981); *Avins v. White,* 627 F.2d 637 (3d Cir.), *cert. denied,* 449 U.S. 982 (1980); *Chuy v. Philadelphia Eagles Football Club,* 595 F.2d 1265 (3d Cir. 1979); *Maheu v. Hughes Tool Co.,* 569 F.2d 459 (9th Cir. 1978); *Davis v. Schuchat,* 510 F.2d 731 (D.C. Cir. 1975). *See also Bussie v. Larson,* 501 F. Supp. 1107 (M.D. La. 1980); *Church of Scientology v. Cazares,* 455 F. Supp. 420 (M.D. Fla. 1978), *aff'd.,* 638 F.2d 1272 (5th Cir. 1981).

Although the Court has never decided expressly the applicability of the *Times-Sullivan* standard to non-media defendants, *see Hutchinson v. Proxmire,* 443 U.S. 111, 133-34 n.16 (1979), the Court has in effect applied the *Times-Sullivan* rule to non-media defendants in *St. Amant v. Thompson,* 390 U.S. 727 (1968) (a candidate for public office), *Henry v. Collins,* 380 U.S. 356 (1965) (individual arrested for disorderly conduct), and *Garrison v. Louisiana,* 379 U.S. 64 (1964) (a district attorney).

In *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975), the court succintly stated the rationale for holding that non-media defendants are entitled to the same degree of constitutional protection as media defendants:

> Our understanding of *New York Times* and its offspring is that private persons and the press are equally protected by the requirement that false comment about public figures must be knowing or in reckless disregard of the truth in order to be actionable. It seems to us a necessary corollary that comment about public figures should be equally protected whether made in mass media or in private. This is required both by the First Amendment, which speaks equally of freedom of speech and of the press, and by common sense, for if the "press" were given more protection than "private speech", persons would be encouraged to rush allegations into wide publication rather than to carefully present them to informed parties for verification or refutation in a more private setting.

Id. at 734 n.3.

The Wisconsin Supreme Court did not make clear whether its holding that non-media defendants are entitled to no constitutional protection for speech applies to cases where the plaintiff is a public figure. Even if the plaintiff is not a public figure, however, a private person should not automatically be excluded from constitutional protection for speech. This is true especially, as in the instant case, where the private person is commenting on a matter of public controversy reported widely in the press. Moreover, denying constitutional protection to non-media defendants also raises equal protection problems and difficulties in defining who are the "media." The protections of the first amendment traditionally have applied to the national publisher and the lone pamphleteer alike. As Justice Abrahamson noted in her dissent in the court below, "[a]re the publishers of handbills, labor union newspapers, local labor union newsletters, or neighborhood association newsletters media or non-media?" (App. at A-36, Abrahamson, J. *dissenting*.) In this

context, applying the constitutional protection to non-media defendants has the added advantage of simplifying the law of defamation.

III. THE WISCONSIN COURT'S HOLDING THAT DEFENDANTS BEAR THE BURDEN OF PROVING TRUTH IN DEFAMATION CASES MAY RESULT IN IMPOSITION OF LIABILITY WITHOUT FAULT.

The court below held that "if a defamation defendant relies on the truth of his statement to avoid liability, he must affirmatively prove such truthfulness as a defense, rather than forcing the plaintiff to prove that the statement is false." (App. A-23, n.35.) In *Gertz v. Robert Welch, Inc., supra,* the Court held that states are free to adopt any rule of liability concerning private plaintiffs so long as "they do not impose liability without fault." 418 U.S. at 347. The court below not only placed the burden of proving truthfulness on a defamation defendant, but also adopted a negligence standard for defamation actions in Wisconsin. As the United States Court of Appeals for the Sixth Circuit recently stated:

> It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of the statement without first determining whether the statement was false. The publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false. The two elements of carelessness and falsity are inevitably linked, for a defendant should not be liable if it "took every possible precaution to insure the accuracy of its assertions." *Gertz, supra,* 418 U.S. at 346, 94 S.Ct. at 3010. Fault then must be held to consist of two elements: carelessness and falsity.

Wilson v. Scripps-Howard Broadcasting Co., 642 F.2d 371, 375 (6th Cir.), *cert. granted*, 102 S.Ct. 500, *cert. dismissed*, 102 S.Ct. 984 (1981) (footnote omitted).

The *Wilson* court determined that falsity is part of the concept of fault. The court also stated that:

> [A] rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations. "[W]hen the trier of fact is unable to determine the truth or falsity of a proposition of fact, he must render his decision against the party having the burden of proof. Consequently, in a jury trial a judge by allocating the burden of proof decides each issue of fact which the jury is to decide." . . . When the jury is uncertain on the issue of the truth or falsity of the statement, as it may have been in the present case, it must find in favor of the plaintiff. A presumption of falsity thus permits liability without fault in the close case, in the case in which the jury is uncertain.

Wilson v. Scripps-Howard Broadcasting Co., supra, 642 F.2d at 375 (citation omitted).

Thus, the Wisconsin court's holding that defamation defendants must bear the burden of proving the truth of statements may lead to liability without fault in violation of this Court's holding in *Gertz v. Robert Welch, Inc.*

CONCLUSION

The Court should grant this petition for a writ of certiorari because: (1) the Wisconsin Supreme Court misapplied constitutional standards to be used to determine whether a defamation plaintiff is a public figure, and thus has afforded inadequate protection to the exercise of the first amendment rights of free

speech and press; (2) the Wisconsin court's conclusion that non-media defendants are not entitled to any constitutional protection for speech violates the first and fourteenth amendments to the Constitution of the United States and the holding conflicts with the majority of holdings in other state and federal courts; and (3) the Wisconsin court's holding that defendants bear the burden of proving truth in defamation cases may result in constitutionally impermissible imposition of liability without fault.

Respectfully submitted,

LAURENCE C. HAMMOND, JR.
(Counsel of Record)
JAMES A. BAXTER III
RALPH V. TOPINKA
Quarles & Brady
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000
Attorneys for Petitioner
Orville R. Mertz

DON S. PETERSON
MARK S. SCHMITT
Minahan & Peterson, S.C.
815 East Mason Street
Suite 1500
Milwaukee, Wisconsin 53202
(414) 276-1400
Attorneys for Petitioner
McGraw-Hill, Inc.